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No. 99-7791

In the Supreme Court of the United States

KESTUTIS ZADVYDAS, PETITIONER

v.

LYNNE UNDERDOWN AND IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service's continued detention of an alien who is subject to a final order of deportation, but whose removal cannot be effectuated immediately, violates substantive due process, where the alien's custody is reviewed automatically by the Immigration and Naturalization Service on a periodic basis to determine whether he would present a danger to society or a flight risk if released.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 192-228) is reported at 185 F.3d. 279. The opinion of the district court (J.A. 111-147) is reported at 986 F. Supp. 1011. The report and recommendation of the magistrate judge (J.A. 70-93) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on October 13, 1999 (J.A. 229). The petition for a writ of certiorari was filed on January 11, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1231(a) of Title 8 of the United States Code is set forth in relevant part at App., *infra*, 4a-6a.

3. The regulations of the Immigration and Naturalization Service (INS) that governed the detention of aliens beyond the 90-day removal period prior to December 21, 2000 (8 C.F.R. 241.4) are set forth at App., *infra*, 7a-8a. The regulations of the INS that govern such detention as of December 21, 2000, are set forth at App., *infra*, 9a-26a.

4. The February 3, 1999, memorandum from the Executive Associate Commissioner of the Immigration and Naturalization Service (INS) to INS Regional Directors, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," is set forth at App., *infra*, 27a-31a. The August 6, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors entitled "Interim Changes and Instructions for Conduct of Post-order Custody Reviews," is set forth at App., *infra*, 32a-39a.

STATEMENT

1. a. Petitioner was born in a displaced persons camp in Germany in 1948. His parents were both from Lithuania. In 1956, petitioner immigrated with his family to the United States and became a resident alien. Despite his long residence in the United States, petitioner never became a citizen of this country. J.A. 193, 212-213.

On December 8, 1966, petitioner was convicted of attempted robbery, third degree, in New York state court. J.A. 112. Petitioner was sentenced to six years' imprisonment and served five years of that sentence. J.A. 13. On August 31, 1973, petitioner was arrested on auto theft charges and ultimately was convicted on the basis of a guilty plea. J.A. 13. In 1974, petitioner was convicted on charges of attempted burglary, third degree, in New York state court. J.A. 112. He was sentenced to one and one half to three years' imprisonment. J.A. 13. Petitioner "admitted that he had failed to appear three times on the burglary charge in the 1970's." J.A. 7. During his eventual imprisonment on the burglary charge, petitioner was punished for escape based on his violation of the terms of a furlough or work release program by returning several days late. J.A. 13.[1]

b. On July 6, 1977, the Immigration and Naturalization Service (INS) issued petitioner an order to show cause why he should not be deported. J.A. 112. The INS charged petitioner with being deportable under 8 U.S.C. 1251(a)(4) (1976), as an alien who had been convicted of two crimes involving moral turpitude. J.A. 71 & n.1. Petitioner applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1976). J.A. 71-72.

On July 13, 1977, the INS granted petitioner release on his own recognizance pending disposition of his deportation charges. J.A. 71. According to the conditions of his release, petitioner was required to obtain the INS's permission before changing his place of residence, to report any change of address or employment, and to report to the INS office in New York on August 31, 1977. J.A. 14-15.

The immigration judge (IJ) before whom the deportation charges were pending subsequently remanded petitioner's case to the INS for adjudication of his application for relief under 8 U.S.C. 1182(c) (1976). J.A. 15. That application was ultimately denied by the INS on February 10, 1982. J.A. 15. In July 1982, the INS notified petitioner that his deportation

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[1] Petitioner's early criminal history also reflects a juvenile record and a charge of car theft in 1964. J.A. 7.

hearing was rescheduled for August 25, 1982. J.A. 112. "Facing a hearing before an immigration judge that year, [petitioner] disappeared," J.A. 193, and failed to appear for his deportation hearing, J.A. 112.

c. The INS's attempts to locate petitioner were unsuccessful. He was not heard from again until he was arrested ten years later, in 1992, in Texas, on drug charges for which he had been initially arrested in Virginia in 1987. J.A. 112. "While on bail awaiting trial in Virginia, [petitioner had] fled to Houston, Texas," to avoid the drug charges. J.A. 14, 193. Petitioner "was in hiding from 1987 until he surrendered himself to the [Texas] authorities in 1992." J.A. 7.

On August 17, 1992, petitioner was convicted in Virginia state court of possession of 474 grams of cocaine with intent to distribute it. J.A. 112, 193. He was sentenced to sixteen years' imprisonment, with six years of that sentence suspended. Petitioner served two years' imprisonment on that sentence and was then released on parole in January 1994 to the custody of the INS. J.A. 113, 193-194.

2. a. On January 24, 1994, the INS issued petitioner a superseding order to show cause, charging him with being deportable under 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. V 1993), as an alien convicted of two crimes involving moral turpitude; under 8 U.S.C. 1251(a)(2)(B)(i) (Supp. V 1993), as an alien convicted of a controlled substance offense; and under 8 U.S.C. 1251(a)(2)(A)(iii) (Supp. V 1993), as an alien convicted of an aggravated felony. J.A. 25, 72.

The INS detained petitioner under 8 U.S.C. 1252(a)(2) (Supp. V 1993) pending completion of the deportation proceedings. J.A. 5. Petitioner requested redetermination of his custody status, and a bond hearing was held by an IJ on February 28, 1994. J.A. 5. The IJ declined to order that petitioner be released. J.A. 5-8. The IJ noted that, in order to obtain release under 8 U.S.C. 1252(a)(2)(B) (Supp. V 1993) during the pendency of deportation proceedings, petitioner bore the burden of establishing that he was lawfully admitted, not a threat to the community, and likely to appear at any scheduled hearings. J.A. 6. The IJ found it unnecessary to decide whether petitioner would pose a threat to the community if released because petitioner's five-year flight from prosecution and other information brought out on cross-examination, including an arrest by the FBI for flight to avoid prosecution, "cast[] serious doubt on [petitioner's] likelihood to appear at future hearings." J.A. 8. On April 8, 1994, the Board of Immigration Appeals dismissed petitioner's appeal from that decision. J.A. 9.

b. Meanwhile, petitioner's deportation proceedings continued on the merits. At a hearing before an IJ on March 29, 1994, petitioner admitted all of the allegations in the order to show cause and was found deportable as charged. J.A. 87-88. Petitioner then applied for relief from deportation under 8 U.S.C. 1182(c) (Supp. V 1993). After a hearing on that application, the IJ issued a decision on May 2, 1994, denying petitioner relief from deportation. J.A. 10-20.

The IJ first recognized as a favorable factor petitioner's "family ties in the United States in the form of his mother, five siblings, a wife, and a daughter," although the IJ noted that no family members had testified or provided affidavits in support of petitioner, thus leading the IJ to question the strength of petitioner's relationship with his family. J.A. 18. The IJ also noted that separating petitioner from his daughter "would not be a unique situation for her" in light of their previous separation due to petitioner's criminal offenses and incarceration. J.A. 18. The IJ identified as additional favorable factors petitioner's residency in this country for over 37 years and the fact that deportation to his native country of Germany would cause petitioner hardship because he does not have family ties to Germany and does not speak the language. J.A. 18-19.

The IJ determined, however, that petitioner's favorable equities were outweighed by "extremely serious negative factors such as [petitioner's] criminal history which extends

over a period of almost 28 years and includes burglaries, thefts, and armed robberies, his abuse of drugs, his distribution of drugs, his flights to avoid prosecution and prison, and his questionable rehabilitation," J.A. 20, the latter as evidenced by his minimization of his participation in the drug-trafficking scheme, J.A. 19. Indeed, the IJ observed, "[f]or most of the last 27 years, [petitioner] has been either engaged in criminal activity, in prison, or a fugitive." J.A. 18. He "absconded during the pendency of deportation proceedings," "abused the privilege of a supervised release from prison in 1976, fled to avoid prosecution in 1987, and was a fugitive from justice from 1987 until 1992." J.A. 19. The IJ therefore concluded that a favorable exercise of discretion was not warranted in this case. J.A. 20.[2]

At the time of the deportation hearing, it was believed that petitioner was a citizen of Germany. J.A. 10; see also Sept. 27, 1996 Tr. 42 (petitioner testified that he thought that he was a German citizen until he and the INS learned otherwise). The IJ therefore ordered that petitioner be deported to Germany. J.A. 20. Petitioner did not appeal that decision, and it thereby became a final order of deportation. J.A. 194.[3]

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[2] Because petitioner entered the United States before 1972, the IJ also considered whether petitioner qualified for registry under 8 U.S.C. 1259 (1988 & Supp. V 1993). Under that statutory provision, the Attorney General may provide, in her discretion, a "record of lawful admission for permanent residence," known as "registry" (see *Mrvica* v. *Esperdy*, 376 U.S. 560 (1964)), to an alien who entered the United States prior to 1972 if the alien meets certain statutory criteria, including that he has resided in the United States continuously since entry, is a person of good moral character, is not ineligible for citizenship, and is not inadmissible on certain grounds. The IJ determined that petitioner could not meet the statutory requirement of good moral character under the registry provision because of his conviction of an aggravated felony. J.A. 11-12.

[3] On January 9, 1995, petitioner filed a motion to reopen his deportation proceedings to apply once again for relief under Section 1182(c). J.A. 26. On January 19, 1995, an IJ denied the motion because it

3. In May 1994, an INS official began the process for obtaining travel documents from Germany so that the INS could effectuate petitioner's deportation. J.A. 113. After the INS submitted the necessary application to the German Consulate, the Consulate informed the INS on June 28, 1994, that it had determined that petitioner's parents were Lithuanian and that petitioner is not a German citizen. J.A. 74, 113.[4]

On July 26, 1994, the INS sent a formal written request to the Lithuanian Consulate for a travel document for petitioner based on his Lithuanian parentage. J.A. 74. The Lithuanian Consulate responded on August 22, 1994, stating that it declined to issue petitioner a travel document on the ground that he is not a citizen or permanent resident of Lithuania. J.A. 23, 74, 194. On October 3, 1994, INS Headquarters formally requested permission from Lithuania for the return of petitioner to that country. J.A. 74.

In October 1996, the INS again contacted the Lithuanian Consulate to determine whether petitioner could claim Lithuanian citizenship. J.A. 195. The INS was informed that petitioner could apply for citizenship if he could prove that his parents were born in Lithuania before 1940. J.A. 195, 215-216. On April 23, 1997, the INS forwarded another formal request for travel documents to the Consulate of Lithuania. J.A. 96-98. The letter requested information about how a child born of Lithuanian parents in a country other than Lithuania acquires Lithuanian citizenship. J.A. 97. It also enclosed documents reflecting the baptism of peti-

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was not accompanied by an application for relief under Section 1182(c), and because petitioner could not make a prima facie showing of eligibility for that relief. J.A. 26-27.

[4] The INS continued its efforts to obtain travel documents for petitioner from Germany. The German Consulate obtained further information, but ultimately again denied the request in May 1995, stating that it had conducted extensive research and determined that petitioner is not a German citizen. J.A. 75, 194-195.

tioner's mother and the marriage of petitioner's parents in Lithuania. *Ibid.*; see also J.A. 106-107 (letter enclosing clearer copies of same documents and an additional document relating to petitioner's father). The Lithuanian government provided additional information about the type of documentation required following a meeting in September 1998. J.A. 164-165. See also note 22, *infra*.[5]

4. In the meantime, in September 1995, petitioner had commenced the instant action by filing a petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his continued detention violated the Eighth Amendment, due process, and international law. J.A. 195.

a. The matter was referred to a magistrate judge, who conducted an evidentiary hearing on September 27, 1996. J.A. 70. On February 3, 1997, the magistrate judge issued a report recommending that the petition be denied. J.A. 70-93. The magistrate judge found that petitioner's continued detention under 8 U.S.C. 1252(a)(2)(A) and (B) (1994) was "statutorily authorized and does not constitute an abuse of the Attorney General's broad discretion in immigration matters." J.A. 76-77. The magistrate judge also concluded that petitioner's detention did not violate substantive due process because the purpose of his detention was not punishment, but rather was to further the government's compelling interest in protecting the community and its legitimate interest in preventing aliens from absconding before they are deported, and because petitioner's continued detention was not an excessive means of accomplishing those purposes. J.A. 79-82. The magistrate judge rejected petitioner's contention that because he had been a resident alien, he was entitled to greater protections than the excludable aliens who had been involved in earlier cases upholding the

[5] In addition, the INS submitted an unsuccessful request for travel documents to the Consulate of the Dominican Republic because petitioner's wife is a native of that country. J.A. 64-65, 195.

constitutionality of continued detention. J.A. 82-83. The magistrate judge reasoned that whether detention is punitive turns not on the distinction between resident and excludable aliens, but rather on the governmental purpose underlying the detention. The magistrate judge concluded that the governmental objectives in protecting society and preventing "bond jumping" justify the detention of aliens who at one time had the status of permanent residents. J.A. 83. The magistrate judge also concluded that petitioner was not being arbitrarily imprisoned for an indefinite time in violation of international law or the Eighth Amendment because the INS's efforts to effectuate his deportation were ongoing. J.A. 90-92.[6]

b. On October 30, 1997, the district court issued an order disagreeing with the magistrate judge's recommendation and granting petitioner habeas relief, based on the court's conclusion that petitioner's continued detention violated substantive due process. J.A. 111-147.[7]

[6] The magistrate judge found it unnecessary to determine whether Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276—subsection (c) of which mandated the detention of aliens who are aggravated felons—should be applied retroactively to petitioner's case, because the court had already determined that he was not entitled to relief under the more lenient pre-AEDPA law. J.A. 92; see also J.A. 91 n.8 (indicating that the transition period custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (discussed at note 12, *infra*), allowed petitioner to apply for release on bond, but that the INS had determined that petitioner would not be eligible under those rules).

[7] As an initial matter, the court held that it had jurisdiction over the habeas corpus petition notwithstanding 8 U.S.C. 1252(g) (Supp. III 1997), as amended by IIRIRA. J.A. 115-124. The INS did not contest the district court's jurisdiction on appeal, and the court of appeals held that, under the then-recent decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), judicial review of petitioner's detention is not precluded by Section 1252(g). J.A. 198-199. We agree with the court

The district court framed petitioner's substantive due process claim as presenting the question "whether a legal alien who is under a final order of deportation may be permanently incarcerated because the INS cannot find a country to take him." J.A. 136. The court held that such detention is unconstitutional. The court recognized (J.A. 136-140) that petitioner's detention was consistent with the INS's statutory authority under 8 U.S.C. 1252(a)(2)(A) and (B) (1994), because, "[c]onsidering petitioner's recidivist history and his prior episode of 'bond jumping,' petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings." J.A. 139. The court also noted that Congress nowhere placed a time limit on the detention of aggravated felons, such as petitioner, who cannot meet the statutory standards for release and whose immediate deportation is not possible. J.A. 139-140. And the court recognized that detention of aliens such as petitioner furthers the government's legitimate interests in protecting the community from aggravated felons and preventing aliens from absconding before they are deported, and that those interests "can warrant a deprivation of liberty under the proper circumstances." J.A. 143 (quoting *United States* v. *Salerno*, 481 U.S. 739 (1987)). The court held, however, that petitioner's detention was an excessive means of accomplishing those purposes because of its duration up to that time and what the court believed to be "its potential, if not certainty, for indefinite duration in the future," in light of the INS's lack of success in obtaining travel documents from Lithuania. J.A.

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of appeals that Section 1252(g) does not bar a district court from exercising habeas corpus jurisdiction to consider an alien's challenge to his continued custody following entry of a final order of deportation.

The district court also rejected petitioner's procedural due process claims that challenged various aspects of his deportation hearing. J.A. 126-136. Petitioner did not cross-appeal from those rulings. J.A. 196 n.3.

143. The court therefore ordered that petitioner be released from the INS's custody on conditions to be set by the court after a hearing. J.A. 146-147, 197.[8]

5. The court of appeals reversed. J.A. 192-228. The court reviewed the four statutory regimes that have governed immigration detention since petitioner's placement in INS custody in 1994, in order to determine which regime would currently govern petitioner's detention. The court noted that, "[t]wo of them, the rule in place when [petitioner] was initially detained, see 8 U.S.C. § 1252 (1994), and the Transition Period Custody Rules authorized in IIRIRA (see note 12, *infra*), place the burden on a detainee awaiting deportation to prove that he is not a danger to the community or a flight risk before being released on parole pending deportation." J.A. 199-200. The court noted that under a third regime, enacted in Section 440(c) of AEDPA (see note 6, *supra*), petitioner's detention would be mandatory regardless of the danger or flight risk he posed. J.A. 200. Finally, with regard to the fourth statutory regime, *i.e.*, the permanent provisions of IIRIRA, the court recognized that 8 U.S.C. 1231(a)(6) (Supp. V 1999) "authorizes detention but makes it discretionary beyond an initial ninety day period." J.A. 200 & n.6. The court agreed with the INS that petitioner's detention is governed by Section 1231(a)(6) (J.A. 200-202), emphasizing that "the rapid passage of IIRIRA in the immediate wake of AEDPA seems to indicate that Congress repudiated the harsh mandatory detention regime created by AEDPA for aliens whose deportation is final." J.A. 200-201. The court specifically found that petitioner is subject to detention under Section 1231(a)(6) based on his conviction of an aggravated felony and his conviction of a controlled substance violation. J.A. 202 n.8.

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[8] The district court denied the government's motion to alter or amend the judgment on December 19, 1997, J.A. 150, and petitioner was released by the INS pursuant to the court's judgment in late 1997, J.A. 176.

Turning to the question of the constitutionality of petitioner's continued detention under 8 U.S.C. 1231(a)(6) (Supp. V 1999), the court based its analysis on the assumption that an alien in petitioner's position is entitled to obtain periodic review by the INS of his detention under INS regulations. J.A. 202. The court pointed to the regulations governing review of the custody status of aliens detained under Section 1231(a)(6), which "authorize the release of such aliens when it is determined that the alien 'is not a threat to the community and is likely to comply with the removal order.'" J.A. 203 (citing 8 C.F.R. 236.1(d), 241.4, 241.5). The court further pointed out that those regulations have been "explained and expounded in the February 3, 1999, 'Memorandum for Regional Directors from INS Executive Associate Commissioner Michael A. Pearson concerning 'Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable,'" J.A. 203. That memorandum required the INS to review the custody status of detained aliens every six months to determine whether there has been a change in circumstances that would support release, and to document the alien's file to show reasons for detention decisions; and the governing regulations provided that if an alien requested a custody review in writing, he could appeal the district director's decision to the Board of Immigration Appeals. J.A. 203 & n.9.[9] The court of appeals emphasized that "[t]he district court found that the INS did not err in determining that [petitioner] posed a danger to the community and a flight risk," and that "[s]hould [petitioner] no longer do so, he would doubtless be released." J.A. 204-205.

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[9] See pp. 43-45, *infra* (discussing new regulation replacing this administrative regime with a review process that includes centralized review by INS Headquarters similar to that afforded under the Cuban Review Plan, rather than appeal to the Board of Immigration Appeals).

Against this background, the court of appeals held that the INS constitutionally may continue to detain an alien under a final order of deportation "based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." J.A. 227. In doing so, the court emphasized that the "power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," and that "[t]he power of the national government to act in the immigration sphere is thus essentially plenary." J.A. 206, 207 (citations omitted).

The court rejected petitioner's claim that his detention constituted punishment without trial and violated a substantive due process liberty interest. J.A. 208-209. The court explained that, in *Gisbert* v. *United States Attorney General*, 988 F.2d 1437, 1448, amended by 997 F.2d 1122 (5th Cir. 1993), it had held "that excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return." J.A. 209 (also citing *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1450 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995) (accord with *Gisbert*)). The court further explained that, drawing on the reasoning of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), it had found in *Gisbert* that "detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision." J.A. 210.

The court of appeals rejected petitioner's attempt to distinguish *Gisbert* and *Mezei* on the ground that, unlike the aliens involved in those cases, who were excludable because they were stopped at the border and not allowed to enter this country, petitioner "is a resident alien." J.A. 211. The court acknowledged that petitioner's prior status as a re-

sident alien had entitled him to greater *procedural* due process protections than an excludable alien would have had in the administrative proceedings to determine whether he would be entitled to remain in this country. J.A. 211. But it concluded that different treatment was no longer warranted "when, as here, a final decision to deport the once resident alien has been made and stands unchallenged." J.A. 211; see also J.A. 220. The court opined that even excludable aliens are entitled to certain due process protections and that the lesser protection afforded them in proceedings to determine whether they may enter the country is not based on their excludable status as such, but rather is due to the fact that they are seeking the privilege of entry into this country. J.A. 220.

After reviewing the case law governing the various constitutional protections accorded excludable and inadmissible aliens, the court of appeals concluded that "[n]othing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien." J.A. 223. The court stressed that the constitutional rights of both excludable and deportable aliens may be affected by Congress's power over immigration. J.A. 223 (citing *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893) (United States' power to terminate residence in this country of resident alien); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) (discussing Congress's power to expel aliens who are present in this country)). It follows, the court explained, that when the rights of such aliens come in conflict with the government's sovereign interests, "their rights are constrained accordingly and to the same extent." J.A. 224. The court therefore concluded that "[i]n the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident

or excludable." J.A. 224. When a permanent resident alien becomes the subject of a final order of deportation, that alien is no longer a permanent resident, and "[t]he need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin." J.A. 224. That the government cannot immediately effectuate the deportation of a criminal alien does not alter the analysis, the court reasoned, because, regardless of whether the criminal alien is a former resident or was excludable at the outset, the government has an interest in protecting society against the risk that he will commit more crimes if released or will not appear when actual deportation becomes feasible. J.A. 225-227.

The court of appeals rejected the district court's characterization of petitioner's detention as "permanent confinement," explaining that that characterization "considerably overstates the matter." J.A. 211. The court pointed to the INS's regulatory procedures, discussed earlier in its opinion, which provide for automatic, periodic administrative review of petitioner's detention and allow for his release if the INS determines that he no longer poses a threat to the community or a flight risk. J.A. 211-212.

Finally, the court of appeals rejected the district court's conclusion that petitioner "will never be deported." J.A. 212. The court noted that the circumstances surrounding petitioner's deportation are complex and will doubtless require more time than usual, but that it had not been clearly established that there was no meaningful possibility of ever deporting him. J.A. 212. The court recounted the history of the area in modern-day Lithuania in which petitioner's parents were born, J.A. 212-213, and acknowledged that petitioner "may in a sense be stateless," but it concluded that that did not preclude petitioner from claiming or obtaining Lithuanian citizenship based on the birth of his parents in Lithuanian territory, J.A. 214-216. "Certainly," the court

observed, "there has been no definitive denial by Lithuania of any application for citizenship by [petitioner]." J.A. 216. The court also noted two other possibilities that remained unexplored: a claim by petitioner of German citizenship based on ethnic German ancestry through his mother, and a claim of Russian citizenship because of the Soviet Union's prior control over the birthplace of petitioner's parents and the fact that some of petitioner's relatives live there. J.A. 217-219. The court concluded that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant." J.A. 219.

SUMMARY OF ARGUMENT

The continued detention of an alien by the Immigration and Naturalization Service (INS) under 8 U.S.C. 1231(a)(6) (Supp. V 1999) does not violate substantive due process where the alien is under a final order of deportation but has not yet been removed, and the alien's detention is subject to periodic administrative review to determine whether he would present a risk to the community or of flight if released. Congress's enactment of Section 1231(a)(6) and its predecessor statutes reflects Congress's judgment that the government's interests in preventing danger to the community and ensuring the appearance of aliens at future immigration proceedings justify the Attorney General's continued detention of an alien whose release would present such risks. Section 1231(a)(6), as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-575, reflects Congress's determination that, when faced with the difficult situation of an alien under a final order of deportation who has no right whatsoever to be in this country but

who cannot be removed within the removal period, the Attorney General must be provided sufficient authority to determine how best to serve those interests and also to be able to release aliens where such release would not undermine those interests.

The Attorney General's detention of an alien, pursuant to the statutory authority granted her by Congress, must be accorded substantial deference under the plenary power doctrine. This Court has recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Moreover, this Court has made clear that, when Congress vests in the Attorney General the discretionary authority over detention decisions regarding aliens subject to deportation, such decisions are subject to only the most deferential standard of judicial review. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953); *Carlson* v. *Landon*, 342 U.S. 524 (1952); *Reno* v. *Flores*, 507 U.S. 292 (1993). Petitioner's claim to heightened due process scrutiny cannot be reconciled with those rulings.

Congress's grant of authority to the Attorney General to detain dangerous aliens such as petitioner is consistent with this Court's substantive due process precedents. The Court upheld the Attorney General's similar exercises of detention authority over aliens in *Mezei* and *Carlson* based on the threat of harm to the community that Congress determined would be posed by the release of such aliens. And the Court has upheld the constitutionality of detention based on future dangerousness in other contexts involving citizens, where the special deference to the political Branches in matters regarding aliens was not even involved. See *Kansas* v.

Hendricks, 521 U.S. 346 (1997); *United States* v. *Salerno*, 481 U.S. 739 (1987). In light of the deference due Congress's judgment in immigration matters, the government's interest in preventing the release into society of an alien who is awaiting removal, and who has been determined by the Attorney General to pose a risk to the community if released, is sufficiently weighty to justify Congress's authorization of detention here.

Petitioner's long-time residency in this country does not mean that his detention following entry of a final order of deportation violates due process. Petitioner's failure to obtain United States citizenship during his 44 years of residency here means that petitioner remains subject to the plenary power of Congress to expel aliens. That does not mean that the Due Process Clause of the Fifth Amendment is altogether inapplicable to petitioner. But it does mean that any due process inquiry must take into account the substantial deference owed the political Branches in determining what process is due, as the court of appeals' analysis in this case did. The court of appeals reasonably held that, for purposes of a due process analysis of immigration detention, petitioner stands essentially on the same footing as an excludable alien who has been ordered removed after seeking to enter the United States. The alien's lack of a right to be present in the United States, and the government's countervailing interests in protecting against danger to the community and effectuating removal, are the same in the two situations. Congress views the United States's interests to be analogous in detaining a former resident alien like petitioner and an excludable alien, because both categories of aliens are subject to detention beyond the removal period under 8 U.S.C. 1231(a)(6) (Supp. V 1999).

Detention of an alien like petitioner under Section 1231(a)(6) is not unconstitutionally indefinite or excessive. Such detention cannot fairly be characterized as indefinite in light of the existence of administrative procedures that

provide for a periodic and meaningful review of petitioner's custody, and the possibility that continued diplomatic efforts with Lithuania, Germany or Russia might result in petitioner's removal. Such detention is not excessive compared to the interests the government seeks to protect. As in *Kansas* v. *Hendricks*, Congress has adequately distinguished the persons who may be detained under Section 1231(a)(6) from other persons whose detention would not be related to a legitimate government interest. The fact that petitioner may currently be stateless does not mean that he cannot be removed to another country, particularly, for example, if he is able to obtain citizenship elsewhere. The courts should be especially reluctant to second-guess Executive Branch judgments regarding the prospects of removing such an alien, both because of the Executive's greater expertise and access to all the relevant information and communications, and because of the need for the Nation to speak with one voice on such matters.

ARGUMENT

THE CONTINUED DETENTION OF AN ALIEN UNDER A FINAL ORDER OF DEPORTATION WHOSE REMOVAL HAS NOT YET BEEN EFFECTUATED COMPORTS WITH DUE PROCESS, WHERE THE DETENTION IS SUBJECT TO PERIODIC REVIEW TO DETERMINE WHETHER THE ALIEN WOULD PRESENT A RISK TO THE COMMUNITY OR OF FLIGHT IF RELEASED

A. The Attorney General's Decision To Detain An Alien Under A Final Deportation Order, Pursuant To Authority Granted By Congress, Must Be Accorded Substantial Deference Under The Constitution

1. This Court has long made clear that the political Branches enjoy broad powers over immigration. *Chae Chan*

Ping v. *United States*, 130 U.S. 581, 606 (1889). Indeed, "over no conceivable subject is the legislative power of Congress more complete." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). The Court has explained that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

The authority of the political Branches in immigration matters derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893). "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

Contrary to petitioner's contention (Br. 9, 14, 24-25), there is no exception to these fundamental principles for matters concerning the detention of aliens in connection with their removal from the United States. The detention of aliens, like other aspects of immigration, has clear implications for the Nation's sovereignty, security, and foreign policy. Accordingly, the political Branches' plenary power over immigration encompasses the formulation of policies concerning the detention of aliens against whom removal proceedings have been commenced or a final order of removal has been entered. Indeed, "[p]roceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896).

These concerns may be especially pronounced when the removal of an alien who is no longer entitled to remain in the United States cannot be effectuated immediately because of the refusal by another nation to accept responsibility for its own citizens. See *Mezei*, 345 U.S. at 216 ("Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs."). That is especially so when the Attorney General reasonably determines that such an alien, who has no right to be here, would pose a risk of flight or danger to the community of the United States if released.

Negotiations between the Executive Branch and a foreign country concerning the return of an alien, as well as to establish the logistics for accomplishing the return, can be sensitive and difficult, sometimes for reasons wholly unrelated to the circumstances of any particular alien. That could be true, for example, where the other country's refusal to accept the return of its citizens is part of a broader diplomatic schism between the two nations, or where arrangements for repatriation are tied up with efforts at a more general normalization of relations. In other situations, negotiations with the other country may be especially difficult because of the particular alien involved—where, for example, the alien is a terrorist who the other country might want to remain in the United States precisely because of the risk of harm he presents, or the alien is simply unwelcome because of his criminal background or other characteristics. Critical sovereignty, security, and foreign policy concerns would arise if another country, simply by refusing to accept the return of its own citizens, could force the United States to allow those aliens to be at liberty in the United States, even where they would threaten harm to the community or flee if released. And if a United States court ordered the release of the aliens on the basis of a determination that they are unlikely to be removed in the near future, the effect would be to undermine the position of the United States in

the international community, speaking with one voice through the Executive Branch, that the other nation must promptly accept the return of its citizens who have been ordered deported from the United States. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

It is for reasons such as these that the political Branches must have broad latitude in fashioning policies concerning the detention or release of aliens who are ordered removed from the United States, and that courts must give great deference to Congress in enacting laws governing detention and to the Executive in implementing those laws. See *Gisbert* v. *United States Attorney General*, 988 F.2d 1437, 1447 ("The United States cannot be forced to violate its national sovereignty in order to parole [criminal] aliens within its borders merely because [the native country] is dragging its feet in repatriating them."), amended by 997 F.2d 1122 (5th Cir. 1993); *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1448 (9th Cir.) (en banc) ("Reading a time limit on detention [of excludable aliens] would risk frustrating the government's ability to control immigration policy and relations with foreign nations."), cert. denied, 516 U.S. 976 (1995).

2. This Court has expressly upheld the authority of the Attorney General, acting pursuant to congressional authorization, to detain an alien as a means of enforcing the decision that the alien is not entitled to be admitted into the United States. See *Mezei*, 345 U.S. at 210, 215-216. And the Court has upheld, against constitutional challenge, the power of Congress to vest the Attorney General with the discretion to determine whether to release an alien from custody pending deportation proceedings. *Reno* v. *Flores*, 507 U.S. 292, 306 (1993); *Carlson* v. *Landon*, 342 U.S. 524, 538-544 (1952); cf. *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) ("Even

outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings.").

Petitioner's claim (Br. 8, 11-13) that his immigration detention nonetheless necessarily implicates a fundamental liberty interest that requires application of heightened due process scrutiny cannot be reconciled with those rulings. The Court has made clear that when Congress vests in the Attorney General the discretionary authority over the detention of aliens subject to deportation, the Attorney General's decisions are subject to only the most deferential standard of review. *Carlson*, 342 U.S. at 540-541 (noting congressional intent "to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse," and holding that the Attorney General's detention determination can be overridden only "where it is clearly shown that it 'was without a reasonable foundation'"); *Flores*, 507 U.S. at 306 (INS regulation governing detention must meet "the (unexacting) standard of rationally advancing some legitimate governmental purpose"). Petitioner's invocation (Br. 13, 15, 20) of a narrow-tailoring standard is also inconsistent with those decisions. See, *e.g.*, *Flores*, 507 U.S. at 301-302, 305, 306 (quoting narrow-tailoring standard when describing parties' claim, but requiring no more than rationality and a "reasonable fit" between governmental purpose and means chosen to advance that purpose).

For these reasons, the Attorney General's exercise of congressionally delegated authority to detain an alien in petitioner's circumstances should be accorded the utmost deference under this Court's precedents recognizing the plenary power of the political Branches with respect to immigration, which here includes protection of the United States and its citizens and lawful residents against harm that

might be perpetrated against them by aliens who have already been convicted of aggravated felonies. See *Carlson*, 342 U.S. at 534-536, 538, 542; *Aguirre-Aguirre*, 526 U.S. at 425 ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'").

B. Detention Of An Alien Who Has Been Determined To Pose A Risk To The Community Or Be Unlikely To Comply With A Final Deportation Order If Released Furthers Important Governmental Interests And Comports With Due Process

1. *Congress has concluded that detention of a criminal alien under a final deportation order is justified in these circumstances*

Congress has made clear, over the course of the last decade, that in its judgment detention by the Attorney General of a criminal alien under a final order of deportation is justified where the alien poses a risk to the community or is unlikely to appear for further immigration proceedings if released. Preventing danger to the community is undoubtedly a legitimate goal of the government, *Salerno*, 481 U.S. at 747, as is ensuring the appearance of aliens at future immigration proceedings, *id.* at 749. Congress has relied on those two interests in a series of recent amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which have included risk to the community and risk of flight as grounds for continued detention of a criminal alien under a final order of deportation.

In 1988, Congress enacted a provision directing the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of his criminal sentence, and not to release the aggravated felon from custody. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470; 8 U.S.C. 1252(a)(2) (1988). In

1990, Congress amended that provision to clarify that it applied to aliens both before and after they became subject to a final order of deportation. The 1990 amendment also added a statutory exception to the mandatory-detention provision that required the release on bond or other conditions of an aggravated felon who had been lawfully admitted for permanent residence, but only if the Attorney General determined that the alien was not a threat to the community and was likely to appear for any immigration hearings. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049; 8 U.S.C. 1252(a)(2)(A) and (B) (1988 & Supp. II 1990). In 1991, Congress reworded that exception to provide that the Attorney General could not release a lawfully admitted alien who was an aggravated felon unless the alien demonstrated "to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751; 8 U.S.C. 1252(a)(2)(B) (Supp. III 1991); 8 U.S.C. 1252(a)(2)(B) (1994).[10]

When Congress enacted AEDPA in 1996, it eliminated the provision allowing release of aggravated felons (and certain other criminal aliens) if they satisfied the Attorney General that they would not pose a threat to the community and would be likely to appear for hearings if released. See 8 U.S.C. 1252(a)(2), as amended by AEDPA § 440(c), 110 Stat. 1277. That section of AEDPA was replaced less than six months later, however, by the provisions of IIRIRA that

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[10] That is the version of the statute that was in effect when petitioner initially requested that he be released on bond pending his deportation proceedings (see J.A. 5-8 (March 14, 1994, IJ decision applying that statutory standard)), and when he filed his petition for habeas corpus relief in September 1995 (see J.A. 195). See also J.A. 77 (magistrate judge applying that statutory standard); J.A. 137-140 (district court invoking same statutory provision).

grant the Attorney General discretion to release a criminal alien after expiration of the statutory 90-day removal period,[11] but specify that she may continue certain aliens in custody beyond that date, including any alien "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (Supp. V 1999).[12]

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[11] At the time of petitioner's deportation proceedings, the INA referred to aliens who were present in the United States but subject to expulsion as "deportable," and to aliens at the border who were subject to continued exclusion as "excludable." See 8 U.S.C. 1182, 1251 (1994). The administrative proceedings in which those determinations were made were called "deportation" and "exclusion" proceedings, respectively. 8 U.S.C. 1227, 1252 (1994). Section 301 of IIRIRA amended the INA to refer to "excludable" aliens as "inadmissible" aliens (*e.g.*, 8 U.S.C. 1182, 1225 (Supp. V 1999)), and established "removal" proceedings to take the place of "deportation" and "exclusion" proceedings (*e.g.*, 8 U.S.C. 1229a (Supp. V 1999)).

In this brief, we use pre-IIRIRA terminology when discussing historical facts relating to the entry of petitioner's final deportation order under the former statutory framework and when discussing cases decided under pre-IIRIRA law. Elsewhere, we use the current "removal" terminology.

[12] In addition to the permanent provision of IIRIRA codified at 8 U.S.C. 1231(a)(6) (Supp. V 1999), IIRIRA also contained transition period custody rules that governed the detention of certain aliens during the first two years following enactment of IIRIRA, pursuant to certification by the Attorney General that there was insufficient detention space. See IIRIRA § 303, 110 Stat. 3009-585 to 3009-587. Those rules provided a standard for release of lawfully admitted aliens similar to that set forth in the INA immediately prior to enactment of AEDPA. IIRIRA § 303(b)(3)(B)(i), 110 Stat. 3009-587. In addition, the rules provided that an alien who was not lawfully admitted, and who could not "be removed because the designated country of removal will not accept the alien," could be released if he similarly satisfied the Attorney General that he would "not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587.

The augmented provisions for detention in AEDPA and IIRIRA represented Congress's considered response to what it perceived to be substantial deficiencies in the system previously employed for deporting aliens from this country. Congress viewed immigration detention as a solution to the pressing national problem that had arisen due to the widespread commission of crimes by criminal aliens after being released by the INS during the deportation process,[13]

Both the magistrate judge and the district court were cognizant of the enactment of AEDPA and IIRIRA during the pendency of petitioner's habeas corpus proceedings. See J.A. 92 (magistrate judge declining to determine whether Section 440 of AEDPA, 110 Stat. 1276, should be applied to petitioner's case because he had already determined that petitioner was not entitled to relief under the more lenient pre-AEDPA law); J.A. 91 n.8 (magistrate judge stating that the transition period custody rules of IIRIRA § 303(b), 110 Stat. 3009-586, allowed petitioner to apply for a bond redetermination and that the INS had determined that bond would be denied); J.A. 139 n.4 (district court stating that the INS denied petitioner bond under the recently enacted transition period custody rules of IIRIRA).

[13] In floor debates preceding enactment of AEDPA, one of the sponsors of the bill explained that "recidivism rates for criminal aliens are high," citing a Government Accounting Office (GAO) study that found that "77 percent of noncitizens convicted of felonies are arrested at least one more time." 142 Cong. Rec. 7972 (1995). A GAO report published in July of 1997 revealed, for example, that approximately 2000 criminal aliens were released from prison in the second half of fiscal year 1995 before their deportation proceedings were completed and without assessment of the risk they posed to the public. The INS tracked the post-release criminal activity of 635 of those criminal aliens and found that 23 percent had been rearrested for crimes, including 184 felonies. General Accounting Office, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to be Improved* 1, GAO/T-GGD-97-154 (July 15, 1997).

as well as the disappearance of criminal aliens who were released.[14]

In particular, 8 U.S.C. 1231(a)(6) (Supp. V 1999), as enacted by IIRIRA, reflects Congress's determination that, when faced with the difficult situation of an alien under a final order of removal who has no right whatsoever to be in this country but who cannot be removed within the 90-day removal period provided for in 8 U.S.C. 1231(a)(1) (Supp. V 1999), the Attorney General must be granted sufficient authority to determine in each case how best to serve the various competing interests. Those interests include protecting the community from future harm by aliens adjudged not to be lawfully part of the community, ensuring the ultimate effectuation of removal orders, and releasing aliens where such release would not be inconsistent with the other interests.[15]

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[14] An April 7, 1995 report issued by the Senate Committee on Governmental Affairs noted that "[o]ver 20 percent of nondetained criminal aliens fail to appear for deportation proceedings" and that "[u]ndetained criminal aliens with deportation orders often abscond upon receipt of a final notification from the INS that requires them to voluntarily report for removal." S. Rep. No. 48, 104th Cong., 1st Sess. 2 (1995); *id.* at 24 ("In New York, for example, in fiscal year 1993, out of 1695 such notices to surrender sent to criminal and non-criminal aliens, 1486, or 87.7 percent failed to surrender."). A March 1996 report by the Department of Justice, Office of the Inspector General, *Deportation of Aliens After Final Orders Have Been Issued*, "found that 89 percent of non-detained aliens with final orders of deportation failed to surrender for deportation when ordered to do so by the [INS]." 62 Fed. Reg. 48,183 (1997); see also 62 Fed. Reg. 10,312, 10,323 (1997).

[15] When Congress enacted IIRIRA, it recognized that the government may have an interest in releasing aliens on conditions of supervision, rather than maintaining them in detention, in order to ease administrative and financial burdens on the INS. See IIRIRA § 303(b)(2), 110 Stat. 3009-586 (providing for up to two years' delay of effective date of 8 U.S.C. 1226(c) (Supp. V 1999), which mandates detention of certain criminal aliens during removal proceedings, if Attorney General notifies Congress that there is insufficient detention space and INS personnel available to implement the provision). Nonetheless, Congress clearly intended that, under IIRIRA, the Attorney General would increase the INS's detention of criminal aliens by retaining in custody those aliens whose release would pose a risk to the community or a probability of flight. See 8 U.S.C. 1368 (Supp. V 1999) (requiring Attorney General, subject to availability of appropriations, to increase INS detention facilities and to report semiannually to Congress estimates of: the detention space needed to implement IIRIRA's detention provisions (including Section 1231(a)(6)); the number of criminal aliens (and separately the number of aggravated felons) who were released into the community by the INS; and the number of aliens released into the community by the INS due to a lack of detention facilities notwithstanding circumstances the Attorney General believed justified detention); IIRIRA § 387, 110 Stat. 3009-655 (providing for pilot programs to determine feasibility of using closed military bases as INS detention centers).

2. *Congress's authorization to detain dangerous aliens under final orders of removal is consistent with this Court's due process precedents*

a. This Court has upheld exercises of detention authority by the Attorney General over aliens based on the threat of harm to the community that Congress determined would be posed by their release. In *Mezei*, the Court upheld against constitutional challenge the continued detention of an alien who had been ordered excluded (based on nondisclosed evidence and without a hearing) pursuant to a finding that the alien's "entry would be prejudicial to the public interest for security reasons." 345 U.S. at 208. The alien was returning from a 19-month trip abroad to his home in the United States where he had lived for 25 years, but he was adjudged to be permanently excludable from the United States because of the risk to the community that it was believed he would pose. The Court ruled that the continued detention of that alien on Ellis Island, because no country could be located to accept him, did not deprive the alien of any statutory or constitutional right. *Id.* at 215. While acknowledging the resulting hardship caused to the alien,

the Court deferred to Congress, noting that "the times being what they are, Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs." *Id.* at 216. "Whatever our individual estimate of that policy and the fears on which it rests," the Court reasoned, "[the alien's] right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Ibid.* (citing *Harisiades*, 342 U.S. at 590-591).

In *Carlson*, the Court upheld the Attorney General's exercise of discretionary authority to detain certain aliens during the pendency of their deportation proceedings based on a determination that the aliens' release "would be prejudicial to the public interest and would endanger the welfare and safety of the United States" (because the aliens had participated to varying degrees in Communist activities), notwithstanding the aliens' many years' residence in this country without causing such harm, their family connections, and their adherence to previously imposed bail conditions. 342 U.S. at 529-530. The Court rejected the aliens' argument, analogous to petitioner's here, that their detention violated the Fifth Amendment because it was not based on a fear that they would fail to appear for hearings or for deportation. *Id.* at 533-534. The Court made it clear that risk of flight is not the only governmental interest that justifies immigration detention, explaining that "[d]etention is necessarily a part of th[e] deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." *Id.* at 538. Moreover, the Court observed, because "purpose to injure" could not be imputed to all aliens subject to deportation, Congress properly granted the Attorney General discretion to determine which aliens to detain on that ground. *Ibid.*

The Court in *Carlson* thus upheld the authority of the Attorney General to determine whether an individual alien would pose a risk to the community if released, noting that "the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all the[] parties without bail as a menace to the public interest." 342 U.S. at 541; see also *id.* at 542-544. The Court concluded by declaring that "[t]here is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government." *Id.* at 542.

As in *Mezei* and *Carlson*, there is no denial of due process in this setting if the Attorney General determines that there is a reasonable apprehension of harm to the community by an alien (like petitioner) who is under a final order of deportation and has engaged in serious criminal conduct in the past, as evidenced by his conviction of an aggravated felony. The government's interest in protecting the community from the threat of harm posed by such an alien is a legitimate objective and has been "historically so regarded." *Kansas* v. *Hendricks*, 521 U.S. 346, 363 (1997).

b. The *Mezei* and *Carlson* cases demonstrate that petitioner's general proposition (Br. 8, 9, 10, 13-17, 19)—that detention of an alien cannot be based on future dangerousness—is wrong.[16] The decisions on which peti-

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[16] The INS's determination not to release petitioner in this case was based on the risk of flight he would pose if released, as well as the risk of harm to the community he would pose. Petitioner has a long and serious record of flight, including three failures to appear on a burglary charge, failure to return in a timely manner after release on a furlough, a failure to appear at his original deportation hearing after having been released by the INS on conditions, flight from law-enforcement officials after being charged with a serious drug-trafficking crime, and his five-year fugitive status on that charge. See pp. 3-4, *supra*. Indeed, in denying petitioner's request for release on bond during the pendency of his deportation proceedings, the IJ explained that "[i]t is not really necessary" to decide

tioner relies (Br. 13-17) are not to the contrary. None of those cases involved the detention of an alien, let alone an alien under a final order of deportation who has been adjudicated to have no legal right to remain in this country. Moreover, the Court *upheld* the constitutionality of detention based on future dangerousness in two of those cases, *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), and *United States* v. *Salerno*, 481 U.S. 739 (1987), both of which involved the detention of citizens. A fortiori, they do not stand for the proposition that the detention of aliens in the circumstances presented here is unconstitutional.

The *Hendricks* Court explained that a significant liberty interest of the individual was at stake there because of his involuntary civil commitment under a sexually violent predator statute, but emphasized that the individual's liberty interest in that setting "is not absolute" and "may be overridden even in the civil context" in certain circumstances.

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whether petitioner would pose a threat to the community if released, because petitioner's "five year flight from prosecution and the information brought out by the [INS] on cross-examination casts serious doubt on [petitioner's] likelihood to appear at future hearings." J.A. 8. Although petitioner now attempts to discount the risk of flight as a basis for his detention by the INS (see Br. 13-14), the district court expressly found that, "[c]onsidering petitioner's recidivist history and his prior episode of 'bond jumping,' petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings." J.A. 139. The court of appeals embraced that district court finding, noting that, should petitioner no longer pose such a danger or flight risk, "he would doubtless be released." J.A. 204-205.

Petitioner errs in contending that the government's interest in ensuring his availability for removal is not a justification for his detention because that interest "becomes as remote as departure itself." Pet. Br. 14. For the reasons discussed below, petitioner unduly discounts the likelihood of his removal. See pp. 47-49, *infra*. But because petitioner does not challenge the general validity of risk of flight as a basis for immigration detention, we discuss further only his challenge to future dangerousness as a basis for immigration detention.

521 U.S. at 356. The Court concluded that, because the statute was limited to persons who were found to pose a risk of future dangerousness and were unable to control their dangerousness, the statute "adequately distinguishe[d]" the detainees "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings" and, therefore, "plainly suffice[d] for due process purposes." 521 U.S. at 360.

Similarly, the *Salerno* Court, in the course of upholding pretrial detention based on future dangerousness, rejected the argument that future dangerousness could not justify detention, explaining that the Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." 481 U.S. at 748. Significantly, among the examples cited in *Salerno* were the Court's previous holdings that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings." *Ibid.* (citing *Carlson* and *Wong Wing*, *supra*). The Court recognized the liberty interest at stake in *Salerno*, but, relying on its cases holding that an individual's liberty interest "may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society," concluded that the federal pretrial detention statute satisfied that standard. 481 U.S. at 750-751; cf. *id.* at 752-753 (rejecting argument that, because "a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants," the Eighth Amendment prohibits the government from restricting pretrial release to serve compelling interests other than risk of flight, such as protecting society from dangerous persons). Similarly here, in light of the deference due the judgment of Congress and the Executive in immigration matters, the government's interest in preventing the release into society of an alien who is awaiting removal from this country, and who has been determined by the Attorney

General to pose a risk to the community if released, is sufficiently weighty to justify detention.

3. *Petitioner's prior long-time residency in this country does not render his detention unconstitutional, because his right to remain here has been terminated*

a. Petitioner is wrong in contending (Br. 21-25) that his long-time presence in this country entitles him to more stringent constitutional limitations on detention than the court of appeals afforded him.

Despite petitioner's 44 years of residency in this country, he never obtained United States citizenship. This Court has made clear that aliens who "fail to obtain and maintain citizenship by naturalization * * * remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson*, 342 U.S. at 534. As the Court has recognized, the fact that "aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades*, 342 U.S. at 587-588.

Congress's plenary power over aliens does not, however, render the Due Process Clause of the Fifth Amendment altogether inapplicable to petitioner. As the court of appeals acknowledged, petitioner and other aliens "can of course claim some constitutional protections." J.A. 207 (also noting that, under Fifth Circuit precedent, even excludable aliens who fail to effect an entry into the United States are considered persons entitled to protection under the Fourteenth Amendment (citing *Lynch* v. *Cannatella*, 810 F.2d 1363, 1375 (1987)). Cf. *Jean* v. *Nelson*, 472 U.S. 846 (1985) (remanding for consideration of how discretion was exercised under statute and declining to reach constitutional issue of whether Fifth Amendment applies to consideration of un-

admitted aliens for parole); *Plyler* v. *Doe*, 457 U.S. 202 (1982) (holding that alien children who were not legally admitted into United States were "persons" entitled to claim benefit of Equal Protection Clause of Fourteenth Amendment). But the fact that petitioner is a "person" protected by the Due Process Clause does not determine what process is "due" under that Clause. Furthermore, in determining what process (both procedural and substantive) is due, substantial weight must be given to the good faith judgments of Congress and of the Attorney General, to whom Congress has assigned the responsibility for administering the INA and for weighing the relevant factors in doing so. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

b. The court of appeals in this case reasonably held that, for purposes of due process scrutiny of immigration detention, petitioner stands on essentially the same footing as an excludable alien who has been ordered removed after seeking to enter the United States. The alien's lack of a right to be present in the United States, and the government's countervailing interests in protecting against danger to the community and effectuating removal, are the same in the two situations. See J.A. 206-211, 219-227; see also *Ho* v. *Greene*, 204 F.3d 1045, 1058-1059 (10th Cir. 2000) (once a final order of deportation has been entered against a resident alien, that alien has no greater right with respect to release into this country than does an alien seeking to enter the country for the first time) (citing *Mezei*, 345 U.S. at 213).

Petitioner has exhausted all avenues of possible relief from deportation, and the final order of deportation extinguished his status as a lawful permanent resident and eliminated any legal right he had to remain here. See 8 U.S.C. 1101(a)(20) (1994); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. V 1999); 8 C.F.R. 1.1(p). As the court of appeals put it, "[w]hen a former resident alien is * * * finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate

this decision." J.A. 224. Petitioner remains in this country only because his final deportation order has not yet been effectuated.

The fact that petitioner has no legal right to be in this country means that he has no right to maintain ties with members of the community by maintaining a continued presence at large in our society, regardless of the length of his prior residency here. Thus, the remaining interests petitioner has at stake at this point are substantially different from, for example, those of the alien in *Landon* v. *Plasencia*, 459 U.S. 21 (1982), who had developed ties to this country as a long-term resident and still had the possibility of establishing, during exclusion proceedings, that she should be allowed to retain her status as a lawful permanent resident and maintain those ties. See *Ho* v. *Greene*, 204 F.3d at 1059.

The United States' interests in protecting its national sovereignty, in not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country, and in protecting our society from any such foreign nationals who would pose a danger if released, are the same in the case of an alien under a final order of deportation, regardless of his prior residency here, as they are in the case of an alien who has never resided here. The only act remaining to be carried out in both cases is the actual removal of the alien.

Congress, as the Branch of government having plenary authority to establish policies affecting aliens, regards the United States' interest to be analogous in detaining a former resident alien and an alien who never entered the country, at the point at which either is under a final order of removal. In 8 U.S.C. 1231(a)(6) (Supp. V 1999), Congress vested the Attorney General with the discretionary authority to detain beyond the removal period both aliens who were admitted to the country but subsequently ordered deported on one of the

specified grounds, regardless of how long they resided in this country (*i.e.* aliens "removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4)" of Title 8), and aliens who were never admitted to this country and never resided here (*i.e.* aliens "inadmissible under section 1182" of Title 8). 8 U.S.C. 1231(a)(6) (Supp. V 1999). And Congress made no distinction between aliens who have resided in this country, regardless of how long, and aliens who have never resided here, when it authorized the Attorney General to detain beyond the removal period any alien she determines "to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (Supp. V 1999).[17]

Treating aliens under a final order of removal in the same manner, regardless of whether they are former residents being expelled or applicants being barred from entering, is wholly consistent with the scope of the political Branches' authority over aliens, as this Court has long recognized:

> The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.
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>
> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source,

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[17] Indeed, in IIRIRA, Congress took a significant step toward eliminating distinctions between the treatment of resident aliens and aliens applying for admission when it created one new proceeding, termed a "removal" proceeding, in which to determine both expulsion and exclusion cases, replacing the formerly distinct deportation and exclusion proceedings. See note 11, *supra*.

are supported by the same reasons, and are in truth but parts of one and the same power.

Fong Yue Ting v. *United States*, 149 U.S. 698, 707, 713 (1893).

That is not to say that the status of an alien—be it his presence outside of the country, his lawful permanent residence in this country, or some other feature—cannot be relevant to certain due process inquiries. *Plasencia*, for example, illustrates that presence outside the United States may be significant for some purposes, whereas long-time residency may be relevant for others. The Court held in *Plasencia* that an alien making a physical re-entry to the country was properly placed in exclusion proceedings as an alien seeking admission, notwithstanding the fact that she was a lawful permanent resident claiming that she should not be considered to be making an entry and should, instead, be placed in deportation proceedings based on her permanent resident status. 459 U.S. at 27-28. The Court further held, however, that, as a permanent resident alien, she had developed ties to the country that entitled her to more procedural due process protections during her exclusion hearing than would be due an alien who was not a permanent resident. *Id.* at 32-34. Significantly, the dispositive fact in that procedural due process analysis was not that the alien was physically present in the country, because she was not (she was detained at a port of arrival), but rather the particular interest of the alien that was at stake—whether she could remain a permanent resident of the country and maintain her ties thereto—considered in light of the competing governmental interests. *Id.* at 34; see also *Flores*, 507 U.S. at 302 ("'[s]ubstantive due process' analysis must begin with a careful description of the asserted right"). As the court of appeals in this case explained, the fact that aliens outside the United States "are entitled to a lesser degree of procedural due process in proceedings to

determine whether they may enter the country stems ultimately not from their status as such, but rather from the nature of what is asserted." J.A. 220.

In *Mezei*, the nature of the alien's interest was also the focus of the Court's analysis, not simply the fact that he was outside of the country. Like petitioner, the alien there had been a long-time resident of the United States (for 25 years), but the Court did not find that that status entitled him to heightened due process protections even in his exclusion proceedings. Because the alien had been gone from the country for approximately 19 months, he did not have an interest in maintaining ties to the country analogous to that of a current resident alien. Other cases cited by petitioner illustrate that an alien's status affects the due process analysis in cases where the governmental interest at stake is not based on the federal government's authority over aliens. *E.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (distinguished in *Fong Yue Ting*, 149 U.S. at 725, as presenting the question "of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country"); *Plyler* v. *Doe*, *supra*; see *Mathews* v. *Diaz*, 426 U.S. 67, 84-87 (1976).

The fact that an alien is under a final deportation order does not mean that such an alien has no substantive due process rights at all. Although an order eliminates the alien's right to be at large in this country and, therefore, diminishes the substantive interest at stake in detention decisions, it does not, for example, eliminate an alien's interest in not being subject to punishment by imprisonment at hard labor without a judicial trial to establish his guilt. *Wong Wing*, 163 U.S. at 235 (distinguishing punishment at hard labor from detention of an alien subject to deportation). In sum, the due process analysis turns not only on the status of the person as an alien, but rather also on the nature of the alien's interest that is at stake, considered in light of the

governmental purposes furthered by the challenged governmental action.

C. Detention Of Aliens Such As Petitioner Under Section 1231(a)(6) Is Not Unconstitutionally Indefinite Or Excessive

Petitioner's characterization of his detention as indefinite (Br. 16, 25) and excessive (Br. 20) is both erroneous and legally insufficient to render his detention in the present circumstances a violation of substantive due process.

1. Petitioner's detention cannot fairly be characterized as permanent or indefinite, in light of (a) the existence of administrative procedures that provide for a periodic and meaningful review of petitioner's custody, and (b) the possibility that continued diplomatic efforts with Lithuania, Germany, or Russia may result in petitioner's removal. The future termination of petitioner's detention was not demarcated by a specific event, unlike an alien's mandatory detention pending removal proceedings or his detention during the 90-day removal period. But continued detention under Section 1231(a)(6) is limited by the Attorney General's administrative review procedures.[18] Petitioner's detention

[18] The INS's interim regulations implementing the permanent detention provisions of IIRIRA, 8 C.F.R. 241.4, were not promulgated until March 6, 1997, and they became effective on April 1, 1997. 62 Fed. Reg. 10,312. That was after the magistrate judge's February 3, 1997, report and recommendation in this case, and only a few months before entry of the district court's judgment in October 1997. The INS's memoranda implementing further procedures for custody reviews of aliens detained beyond the removal period (see App., *infra*, 27a-39a; see p. 43, *infra*) were not issued until 1999. Because petitioner was released in late 1997 pursuant to the district court's order, the question of his detention was not reviewed by the INS under the supplementary procedures.

On appeal, the court of appeals relied on the custody review procedures in effect at the time of its consideration of the case because the INS's detention of petitioner would now be governed by 8 U.S.C. 1231(a)(6)

would cease under those procedures if he established that he no longer posed a risk to the community and that he was likely to be available for removal, and those procedures afford an ongoing opportunity to make such a showing. See *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 399 (3d Cir. 1999) (interim procedures "provide[d] reasonable assurance of fair consideration" of an alien's suitability for release pending his removal from the United States), as amended on Dec. 30, 1999; see also 65 Fed. Reg. 80,281, 80,285 (2000) ("approximately 6,200 aliens have been provided custody reviews by district directors during the period from February 1999 through mid-November 2000, to determine whether detention of the alien beyond the 90-day removal period is warranted"; "[o]f those aliens, approximately 3,380 were released").[19] Also, the INS's detention of petitioner would

(Supp. V 1999) and those implementing regulatory procedures. J.A. 200-203; cf. *Ho* v. *Greene*, 204 F.3d at 1055 n.8 (declining to decide which version of the statute governs the continued detention of an alien who was under a final order of deportation at the time of IIRIRA's effective date). When the court of appeals reversed the judgment of the district court, it stayed its mandate. J.A. 3. The district court's order that petitioner be released therefore remains in effect. If this Court affirms the court of appeals' judgment, the INS will then decide whether petitioner should be returned to custody under the current standards.

[19] Petitioner's characterization of the nature and actual length of the detention at issue here is inaccurate. For example, petitioner asserts that, "[b]ut for the district court's grant of habeas corpus [relief], his incarceration would now have stretched into six years." Pet. Br. 15; see also *id.* at 8. He also asserts (Br. 25) that "without relief from this Court, he will languish in jail forever." See also *id.* at 7 (claiming that he "will return to prison if this Court rules against him").

But this case does not involve mandatory detention. The issue here is whether the Attorney General has the authority, consistent with the Constitution, to continue to detain an alien such as petitioner in the exercise of the discretion granted her by Congress. Petitioner's statements wholly disregard the INS's periodic administrative custody reviews and the possibility that, if petitioner had not been released pursuant to

necessarily cease upon his removal from this country—a matter that continues to be the subject of INS efforts.

On March 6, 1997, the Attorney General promulgated regulations setting forth the manner in which she would exercise her discretion to detain or release aliens under Section 1231(a)(6). See 62 Fed. Reg. 10,312. Those regulations authorized INS district directors to release aliens who demonstrated that they would not pose a danger to the community or a significant flight risk if released. See 8 C.F.R. 241.4 (set forth at App., *infra*, 7a-8a). The regulations set forth a non-exhaustive list of factors that the district directors could consider in making that determination: the nature and seriousness of criminal convictions; other criminal history; sentence(s) imposed and time actually served; history of failures to appear; probation history; disciplinary problems while in custody; evidence of rehabilitative efforts or recidivism; equities in the United States; and prior immigration violations and history. 8 C.F.R. 241.4.

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court order, he might have been released by the INS under its custody review procedures.

Moreover, the length of the specific period of detention at issue here—post-removal-period custody as authorized currently under 8 U.S.C. 1231(a)(6) (Supp. V 1999)—was less than the four years petitioner repeatedly claims (Br. 8, 13, 15, 16). Petitioner's removal order became final on May 2, 1994. At that time, the INA afforded the Attorney General six months in which to remove an alien. That period did not expire for petitioner until approximately November 2, 1994. Petitioner filed the instant habeas corpus action in September 1995, at which time he had been in post-removal-period custody for approximately 10 months. The district court ordered his release on October 30, 1997, a total of approximately three years after expiration of his removal period. During some of that time, *i.e.*, from the enactment of AEDPA on April 24, 1996, to the October 8, 1996, effective date of the transition period custody rules (see note 12, *supra*), the Attorney General was not authorized by statute to release petitioner because he was subject to mandatory detention as an aggravated felon under 8 U.S.C. 1252(a)(2), as amended by AEDPA § 440(c), 110 Stat. 1277.

District directors also were authorized to consider other factors that were not specifically listed. 8 C.F.R. 241.4(a). Aliens who had been detained during the removal period were allowed to request a formal custody review by the INS district director after their deportation orders became final and could appeal any resulting denial to the Board of Immigration Appeals (BIA). See 8 C.F.R. 236.1(d)(2)(ii) and (3)(iii), 241.4, 241.5.

As a supplement to that regulatory procedure, the INS Executive Associate Commissioner issued a memorandum in February 1999 that established additional procedures, under which the custody status of detained aliens whose removal was not immediately practicable would be subject to automatic review during the initial 90-day removal period and (if the alien was not released) every six months thereafter. App., *infra*, 27a-31a. In August 1999, the Executive Associate Commissioner issued a second memorandum that instituted still further procedures, which included centralized review by a special post-order detention unit in INS Headquarters of the custody status of detained aliens such as petitioner. App., *infra*, 32a-39a. Those procedures were effective immediately and are the procedures described by the court of appeals. See J.A. 203-205. They were intended to operate on an interim basis, pending anticipated permanent changes to the regulations themselves.

At the same time those interim procedures were issued, the Attorney General and the Commissioner announced their intention to promulgate new regulations establishing a formal program for reviewing the continued custody under Section 1231(a)(6) of aliens who are not removed during the 90-day removal period. Those regulations were to be modeled after the regulations establishing the Cuban Review Plan, 8 C.F.R. 212.12, which has been in place for a number of years to review the status of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R.

212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. On June 30, 2000, the INS published proposed regulations. 65 Fed. Reg. 40,540. Those regulations were published in final form on December 21, 2000, and are now in effect. 65 Fed. Reg. 80,281-80,298; see App., *infra* 9a-26a. The current regulations are not substantially different in relevant respects from the proposed regulations published in June.

Under the now-current regulations, the INS district director maintains responsibility for the initial review of an alien's custody when the alien's immediate removal is not practicable at the expiration of the 90-day removal period. The district director conducts a record review, including a review of any materials the alien may want to submit, and has the discretion to interview the alien. See 65 Fed. Reg. at 80,295-80,296. If the district director decides to continue the alien in custody at that point, authority over the alien's detention is then transferred to a post-order detention unit at the INS Headquarters, either at the end of the 90-day removal period or within three months thereafter. That unit will then commence a custody review within 30 days of the transfer of detention authority. *Id.* at 80,291.

If the initial headquarters review of the alien's records does not result in a decision to release the alien, he is interviewed by a two-member panel of INS officers, who make a recommendation to the headquarters unit, as under the Mariel Cuban Review Plan. See 65 Fed. Reg. at 80,296. The headquarters unit then makes the final decision whether to release the alien at that point or to continue him in detention. If the alien is not released, his custody status is again reviewed under the headquarters review process within one year, if the alien has not been removed since the last review. *Id.* at 80,297; cf. *Hendricks*, 521 U.S. at 364 (upholding civil commitment of sexually violent predator as "only *potentially* indefinite" because a determination regarding commitment must be made annually, thereby demonstrating that the

State does not intend a detainee to remain in custody beyond the period during which he continues to present a threat of dangerousness). The headquarters unit may review an alien's custody at more frequent intervals, upon request of the alien based on a material change in circumstances since the last annual review. 65 Fed. Reg. at 80,297. The alien receives advance, written notice of custody reviews, is afforded an opportunity to submit any relevant material for consideration by INS officials, and may be assisted by a representative of his choice during the review process. *Ibid.*

Petitioner asserts that these elaborate administrative safeguards are inadequate. But petitioner mischaracterizes the process, claiming that "[t]he INS custody review procedures do not cure the substantive due process violation" because, in petitioner's view, "they omit consideration of key factors in the balancing test from the director's decision to detain." Pet. Br. 9. Specifically, petitioner asserts that the relevant INS regulation "omits from the director's periodic reviews of continued detention consideration of both the length of detention, and the future likelihood of deportation being effected." Br. 15. But that is not true. The INS regulation provides a nonexclusive list of factors that the administrative decisionmakers may consider and allows consideration of other relevant factors, including those factors cited by petitioner. See 65 Fed. Reg. at 80,288.

Petitioner's objection (Br. 15) to having the district director be the decisionmaker disregards the supplemental procedures that were implemented by the INS in 1999 and formalized by regulation to provide for centralized decisionmaking by a specialized unit in the INS Headquarters, analogous to the process that has successfully been applied to the periodic custody reviews for Mariel Cubans. That

centralized decisionmaking has been enhanced in the final regulations. See 65 Fed. Reg. at 80,295.[20]

Contrary to petitioner's contention (Br. 15 & n.5), the fact that the INS's custody review process does not call for all of the same procedures that the pretrial detention statute at issue in *Salerno* provided does not render it constitutionally deficient. Unlike the criminal defendants in *Salerno*, petitioner has absolutely no legal right to be in the United States. He is subject to a final order of deportation that extinguished all such rights. Also, the fact that the Attorney General may release aliens on conditions does not mean (see Pet. Br. 9, 21) that the Constitution bars her from concluding that such conditions are not sufficient in some cases to protect against the risk of harm or flight an alien would pose if released.

2. Detention of aliens under 8 U.S.C. 1231(a)(6) (Supp. V 1999) is not unconstitutionally excessive in relation to the interests the government seeks to protect. As the State did in *Hendricks*, Congress has adequately distinguished the persons who may be detained under Section 1231(a)(6) from those who are dealt with exclusively through criminal proceedings.[21] Only aliens who are under a final order of re-

[20] The current regulations no longer include the "clear and convincing" evidence standard to which petitioner objects (Br. 14). Instead, they provide that the Attorney General may release an alien "if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States." See 65 Fed. Reg. at 80,295.

[21] Restricting the Attorney General's authority over aliens subject to final removal orders to criminal prosecution, as petitioner suggests (Br. 21), would not adequately further the government's interests. Prosecution of such aliens could further delay their removal from this country during the duration of their criminal sentences, while further burdening law enforcement and prison resources for a longer period of time. See 8 U.S.C. 1231(a)(4)(A) (Supp. V 1999) (providing that, except in limited circumstances, "the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment").

moval may be detained by the Attorney General under Section 1231(a)(6). Thus, Section 1231(a)(6) applies only if an alien has already been finally adjudged to lack any underlying right to remain in the United States, and therefore has a greatly diminished liberty interest in living at large in this country. In addition, in order to be detained under Section 1231(a)(6), the alien must be inadmissible; be deportable on certain specified grounds, such as for the commission of an aggravated felony or for conduct endangering public safety or national security; or be determined by the Attorney General to pose a risk to the community or to be unlikely to comply with the removal order. Cf. *Salerno*, 481 U.S. at 747 (statute limited detention to persons who were involved in serious crimes). Moreover, INS's administrative procedures guard against detention that is not related to legitimate government interests.

3. Petitioner's claim that he currently is stateless and not a citizen of any country (Br. 5, 8 n.4, 17) does not mean that he cannot be removed—or, as petitioner would have it, that any detention of him by the INS is unconstitutionally excessive, regardless of the risk to the community or of flight he would pose if released.

The court of appeals correctly ruled that it cannot "now be said with any real assurance" that petitioner "will never be deported." J.A. 212. The court of appeals properly deferred to the Executive Branch in this matter of immigration and foreign policy. Diplomatic efforts are committed by the Constitution to the Executive Branch, which—because of its special expertise and access to information—is responsible for bringing about their success and is best situated to predict whether that will happen. Having reviewed the voluminous record provided by petitioner and the government, the court of appeals provided a detailed summary of the INS's

efforts to remove petitioner to either Lithuania or Germany. J.A. 194-195. It then concluded that, even if petitioner's removal may seem "problematical, difficult, and distant" in the present circumstances, that is not sufficient— "[g]iven the traditional deference [courts] show to the other branches in matters of immigration policy"—for petitioner to meet the very high burden of showing that "deportation is impossible." J.A. 219. See also *Ngo*, 192 F.3d at 398 (concluding "[i]t is extremely unlikely" that the prolonged detention of an excludable alien from Vietnam would be permanent, in light of the diplomatic efforts between the United States and Vietnam to negotiate a repatriation agreement, even though the court characterized the negotiations as proceeding at an "agonizingly slow" rate).[22]

[22] The court of appeals observed that "[c]ertainly there has been no definitive denial by Lithuania of any application for citizenship by [petitioner]." J.A. 216. Subsequent to the court of appeals' decision, the INS has made additional efforts to pursue the process necessary for petitioner to apply for Lithuanian citizenship based on his parents' Lithuanian citizenship. Although petitioner states (Br. 7) that "[a]t the INS's instruction in March of 2000," he "reapplied for Lithuanian citizenship," the letter he proffers (hand-dated March 27, 2000, unaccompanied by proof of mailing) does not purport to comply with various application requirements (including payment of an application fee), as the Lithuanian Consulate General has indicated is necessary. When the INS obtained a letter from the Lithuanian Consulate General to INS Deportation Officer Paul Barrows, dated March 31, 2000, regarding those application requirements, the INS notified petitioner that he must report to the INS office to review his immigration status. See INS Form G-56 dated April 24, 2000 (scheduling appointment for May 4, 2000). Petitioner informed the INS that he could not keep that appointment and requested that it be rescheduled. *Ibid.* But petitioner thereafter failed to keep two subsequently scheduled appointments. See INS Form G-56 dated May 16, 2000 (scheduling appointment for June 1, 2000); INS Form G-56 dated August 1, 2000 (scheduling appointment for August 18, 2000) (returned to INS as undeliverable). We are lodging copies of the relevant documents with the Clerk of this Court.

Moreover, petitioner has evidenced no attempt to pursue other avenues of obtaining travel documents from either Germany or Russia, as suggested by the court of appeals. J.A. 217-219 (noting two possibilities that remained unexplored: a claim by petitioner of German citizenship based on ethnic German ancestry through his mother, and a claim of Russian citizenship because of the Soviet Union's control over the birthplace of petitioner's parents at one time and the fact that some of petitioner's relatives live there). Petitioner's failure to make such efforts stands in sharp contrast to the efforts of Mr. Mezei, who "personally applied for entry to about a dozen Latin-American countries but all turned him down." *Mezei*, 345 U.S. at 209.

Further, the courts should be especially reluctant to second-guess Executive Branch judgments regarding the prospects of removing an alien, both because of the Executive's greater expertise and access to all the relevant information and communications, and because of the need for the Nation to speak with one voice on such matters. See J.A. 219; *Aguirre-Aguirre*, 526 U.S. at 425. Permitting the release of a former resident alien based on an ad hoc judicial determination regarding the probable length of his future detention would intrude into an area of confluence between the Executive's responsibilities for immigration enforcement and diplomacy, signal to other nations that their refusal to accept the repatriation of their own nationals who are detained under final orders of deportation may result in release of the aliens back into American society, and perhaps thereby cause those other nations to ignore or disclaim their responsibility to accept the return of their own nationals who have violated the laws of the United States. See *Barrera-Echavarria*, 44 F.3d at 1448 ("A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage the sort of intransigence Cuba has exhibited in the negotiations over the Mariel

refugees."); *Jean* v. *Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) (en banc) ("[T]his approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back."), aff'd, 472 U.S. 846 (1985).

Thus, the court of appeals correctly concluded that, given the government's plenary authority over immigration policy and its interest "in effectuating deportation of a resident alien and expulsion of an excludable alien," the government "may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." J.A. 227.[23]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[23] Petitioner suggests (Br. 10-11, 25-33) that the Court should avoid the constitutional question presented here by construing Section 1231(a)(6) to authorize detention "for only a reasonable time to effectuate removal." We address that argument in our briefs in *Reno* v. *Ma*, No. 00-38, which is consolidated with this case for oral argument. For the reasons more fully set forth in those briefs, such a construction of Section 1231(a)(6) would be inconsistent with the plain language of that Section, other statutory provisions governing detention of criminal aliens, the statutory history, and the Attorney General's interpretation of Section 1231(a)(6), to which deference is due under this Court's decision in *Aguirre-Aguirre*, 526 U.S. at 425.

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APPENDIX A

1. Section 1226 of Title 8 of the United States Code (Supp. V 1999), provides in relevant part:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of

this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney

General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

* * * * *

2. Section 1231(a) of Title 8 of the United States Code (Supp. V 1999), provides in relevant part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in

detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

APPENDIX B

Section 241.4 of Title 8 of the Code of Federal Regulations (1999) provided:

§ 241.4 Continued detention beyond the removal period.

(a) *Continuation of custody for inadmissible or criminal aliens.* The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) *Continuation of custody for other aliens.* Any alien removable under any section of the Act other than section 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

APPENDIX C

Section 241.4 of Title 8 of the Code of Federal Regulations as revised December 21, 2000, 65 Fed. Reg. 80,294-80,298 provides:

§ 241.4 Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner Field Operations (Executive Associate Commissioner) or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided in paragraph (b)(2) of this section, the provisions of this section apply to custody determinations for the following groups of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act,

including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens.*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who

are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) *District directors.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the three-month period immediately following expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director having jurisdiction over the alien. The district director shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective district.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the 90-day removal period, or any alien who has not been released or removed by the expiration of the three-month period after the 90-day review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner and district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the district director or Executive Associate Commissioner to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director or the Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal

from the United States. The district director or the Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.5a, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G-28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the

HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention beyond the removal period—(1) In general.* The district director shall continue to

undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(2) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(3) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(4) *Alien's cooperation.* Release will be denied if the alien fails or refuses to cooperate in the process of obtaining a travel document. *See, e.g.,* section 241(a)(1)(C) of the Act.

(h) *District director's custody review procedures.* The district director's custody determination will be developed in accordance with the following procedures:

(1) *Records review.* The district director will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director will conduct a records review prior to the expiration of the 90-day removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director by or on behalf of the alien. However, the district director may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's decision.* The district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office staff.* The district director may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decision to those persons directly responsible for detention within his or her district. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, persons acting in such capacities, or such other persons as the district director may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All

recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(j) *Conditions of release.*—(1) *In general.* The district director or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director and Executive Associate Commissioner may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director.* (i) Prior to the expiration of the 90-day removal period, the district director shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the

alien's removal, while proper, cannot be accomplished during the 90-day period because no country currently will accept the alien, or removal of the alien prior to expiration of the removal period is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the 90-day removal period, during which time the district director may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he or she is not removed within the three-month period following the expiration of the 90-day removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews.* (i) *District director referral for further review.* When the district director refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by

the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director retains jurisdiction.* When the district director has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's decision, authority over the custody determination transfers from the district director to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, February 3, 1999; *Supplemental Detention Procedures*, April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews*, August 6, 1999; *Review of Long-term Detainees*, October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http://www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the

last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public

interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director or the Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

APPENDIX D

[EXHIBIT A]

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 90/16.51

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

[Filed: Feb. 3 1999]

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Procedures for Aliens Whose Immediate Repatriation
Is Not Possible or Practicable

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety [90] day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the Dis-

trict Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Director.

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of post order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody reviews. The District Director may use information obtained by local staff or detailees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation, (202) 616-7836.

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.5.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii), the alien may appeal the District Director's Decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4.

8 C.F.R. § 241.4 Continued detention beyond the removal period.

(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(1)(C), 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(1)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 236(c). *See* October 7, 1998 memorandum entitled *INS Detention Use Policy*.

APPENDIX E

[Seal omitted] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/14.6-C

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

[Filed: Aug. 6 1999]

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICE OF FIELD OPERATIONS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.[1] Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or

[1] See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable* and April 30, 1999: *Supplemental Detention Procedures.*

release such an alien is made by the District Director. In the near future, the Service will begin the rulemaking process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is

later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful, and without Headquarters review), and a review with the opportunity for an interview at the alien's request and with Headquarters review.

No case subject to Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

(1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order

removal cases *before* the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.

(2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1)-(3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F.R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

(3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be considered and explain that the alien will be pro-

vided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.

(4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.

(5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.

(6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. *See* 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document *shall* be considered an adverse factor in determining eligibility for release. *See* INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.

(7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

(8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the pre-

liminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.

(9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.

(10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do

so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.

(11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

FORMS [to be distributed]

(a) Notice to Alien
(b) Notice of Interview
(c) Detained Alien Custody Review Worksheet
(d) Decision of Custody Review
(e) Decision to Continue Detention
(f) Decision to Release
(g) Custody Review Status Report